



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.161 OF 2015

MARY ATIENO ONYANGO.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY.....DEFENDANT

RULING

1. Kenya Power and Lighting Company Limited, the Defendant, through the notice dated 24th October 2016 raised the following grounds in objection to the suit filed by **Mary Atieno Onyango**, the Plaintiff.

“1) The court has no jurisdiction to entertain the Plaintiff’s claim as it offends the provisions of Section 3, 6(1) 25, 26, 48, 49, 50 and 108 of the Energy Act chapter 314 of Laws of Kenya.

2) The suit is incompetent, bad in law and the same should be struck out with costs to the Respondent.

3) And other reasons to be adduced at the hearing thereof”.

2. That the court issued directions by consent of Mr. Okwengu and Baganda, learned counsel for the Defendant and Plaintiff respectively, on the 19th June 2017 to file and exchange written submissions on the notice of Preliminary objection. The counsel for the Defendant and Plaintiff consequently filed their written submissions dated 22nd November 2017 and 29th November 2017 respectively.

3. The following are the issues for the court’s determination;

- a. Whether the Plaintiff’s claim is one of those that lie with the Energy regulatory Commission or this court.
- b. Whether the Plaintiff’s claim is an abuse of the court’s process.
- c. Who pays the costs.

4. The court has considered the grounds on the notice of preliminary objection, written submissions by counsel, the pleadings and come to the following determination;

a. That Mary Atieno Onyango, the Plaintiff, became the registered proprietor of land parcel **Kisumu/Kogony/2868** on the 10th November 2003 on the 10th November 2003, as confirmed by the copy of the title deed in the Plaintiff’s list of documents.

b. That the nature of the Plaintiff’s claim against the Defendant is evident from paragraphs 4, 6 (a) to (c) and prayer (a) of her plaint dated 22nd June 2013. That the claim is for trespass in that the Defendant “unlawfully trespassed and erected electricity power lines in the Plaintiff’s land without consent or consideration,” which is by its very nature a continuing tort until and unless it is arrested.

c. That in response to the Plaintiff’s claim, the Defendant filed their statement of defence dated 26th October 2016 and at paragraph 4 denied trespassing onto the Plaintiff’s land. That at paragraph 6, the Defendant averred in the alternative that “if at all there was a power line erected, then the same was done after due process had been followed and relevant consent obtained from the Plaintiff and thus not unlawful.”

d. That the pleadings by the Plaintiff and Defendant clearly shows that there exist a dispute on the issue of first, whether there is a power line erected on the Plaintiff’s land by the Defendant, and secondly whether if it exists, it was done with the consent of the Plaintiff. That accordingly, this is not an appropriate case whether the Defendant can raise a preliminary objection in view of the

holding in **Mukisa Biscuits Company Versus Westend Distributors Limited** [1969] E.A 698 to the effect that “ a preliminary objection cannot be raised if any fact is to be ascertained.....”

e. That unlike the case of **Alice Mweru Ngai –v- Kenya Power & Lighting Co. Ltd** [2015] eKLR, where the Plaintiff had not disputed assenting to the Defendant’s proposal to construct an electric supply line through her land, the Plaintiff herein alleges that her consent has not been sought and or obtained and no compensation has been paid to her. That the situation in this case is more like that in the case of **Peter Mwangi Kabui Versus Rural Electrification Authority** [2016] eKLR where Olao J held as follows;

“In urging this court to decline jurisdiction in this matter in view of the provisions of the Energy Act, counsel for the defendant referred me to my own decision in the **Alice Mweru Ngai case** (supra). In that case however, it was not disputed that the Plaintiff therein had assented to the Defendant’s proposal to construct an electric supply line through her land and had even been paid compensation though she challenged the amount as being minimal and patry. I declined jurisdiction and stated that the dispute was the preserve of the Energy Regulation Commission since it related to the amount payable in compensation That case is distinguished from the circumstances obtaining in this case. In this case the Plaintiff has pleaded in paragraph five (5) of his plaint that the defendant has trespassed onto the suit plots “without his consent or permission.” The defendant on its part pleads in paragraph seven (7) of its defence that it “sought for and was granted wayleave consent by the Plaintiff to enter into and also to install the electric line.” As indicated above whether or not the Plaintiff consented to the installation of the electric lines on the said plots is a matter to be determined at the trial. Therefore, the preliminary object that this suit is the preserve of the Energy Regulation Commission established under the Energy Act is not well founded and must be similarly dismissed.” That though that decision is not binding to this court, it is spot on all the issues raised by the Defendant herein in their preliminary objection.

5. That flowing from the foregoing, the court finds no merit on the Defendant’s preliminary objection vide notice dated 24th October 2016 and the same is dismissed with costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 7TH DAY OF MARCH 2018

In presence of;

Plaintiff Absent

Defendant Absent.

Counsel Mr. Ogeyo for Onyango for Plaintiff

Mr. Edward for Okwengu for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/3/2018

7/3/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Edward for Okwengu for the Defendant

Mr. Ogeyo for P.D. Onyango for the Plaintiff

Court: Ruling dated and delivered in open court in the presence of Mr.

Ogeyo for Onyango for the Plaintiff and Mr. Eduard for Okwengu for

the Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

7/3/2018